In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

Motion for leave to file brief of Citizens for Decency Through Law, Inc., as Amicus Curiae in support of the respondent, with brief annexed.

Charles H. Keating, Jr.
919 Provident Tower
Cincinnati, Ohio 45202

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California 91352

Counsel for Amicus Curiae
Citizens for Decency
Through Law, Inc.

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Interest of Amicus Curiae.

Citizens for Decency through Law, Inc. (short title C.D.L., formerly Citizens for Decent Literature, Inc.) an Ohio Corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian, and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the support of this nation's obscenity laws by cooperating with law enforcement in the enforcement of

the obscenity laws. C.D.L.'s request to appear as amicus curiae on behalf of the Respondent, People of the State of California, arises out of its interest that this Court, in the cause herein, should enunciate a rule of law which clearly distinguishes between the substantive crime of "pandering", which proscribes the promotion of obscenity (whether or not the subject matter is, in fact, obscene)[1], and the use of probative evidence of "pandering" to establish social detriment (lack of redeeming social importance) in the substantive crime of dealing in obscenity.[2]

1/ California Penal Code Section 311.5 was originally enacted in 1961. The language of the 1961 statute was interpreted in Kirby v. Municipal Court of the Newhall Judicial District et al. 237 Cal. App.2d 335, 46 Cal.Rptr. 844 (Sept. 30, 1965) as codifying the "pandering" crime of Sec. 207.10 of the 1957 draft of the Model Penal Code. (See Brief at pages 3-4). In 1969, the awkward language of P.C. 311.5, as originally enacted in 1961, was amended to conform the text to the legislative intent expressed in Kirby. As amended in 1969, P.C. Section 311.5 now reads:

> "Section 311.5. Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

In searching for means of harnessing the porno trade, this Court should not overlook the tremendous potential of a substantive statute, such as P.C. Section 311,5, in law enforcement efforts.

The written consents of the petitioner and the respondent have been requested and both parties have consented in writing. Copies of such consents are being filed with this Court, concurrently with this motion.

In his written consent, the Attorney-General of the State of California indicated that the Clerk of the Supreme Court had informed that office that "petitioner's brief was due on or before January 21, 1977 and respondent's brief thirty days after receipt of petitioner's brief." Moving party understood the same to mean that respondent's brief would be due on February 22, 1977. In a phone conversation with the office of the Clerk of the U.S. Supreme Court on February 14, 1977, moving party was advised that respondent's brief was due on February 22, 1977. A telephone conversation with the Office of the Attorney-General of the State of California on the same date revealed, however, that the respondent's brief was filed on February 12, 1977. Because Rule 42.2 requires an amicus brief to be "presented within the time allowed for the filing of the brief of the party supported"

2/ California Penal Code Section 311.2.

and because of uncertainty as to the correct date for filing to meet that requirement, moving party respectfully requests leave of court to file the within amicus brief, if the same is tardy under Rule 42.2.

Respectfully submitted,

James J. Clancy
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352

Counsel for Citizens for
Decency Through Law, Inc.

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UNITED STATES CONSTITUTION

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PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

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Brief Amicus Curiae of Citizens for Decency Through Law, Inc., in Support of the Respondent

ARGUMENT

I

PETITIONER'S ARGUMENTS, WHICH INCORRECTLY DESCRIBE PENAL CODE SECTION 311.2 AS THE "CALIFORNIA PANDERING LAW", HAVE CREATED A STRAW MAN WHICH DOES NOT EXIST.

A. The California Statutes Set Forth Two Substantive Obscenity Crimes Which Are Separate And Distinct. One Deals With "Obscenity", And The Other Deals With "Pandering".

The California Statutes set forth two substantive obscenity crimes which are separate and distinct; namely, California Penal Code sections 311.2 and 311.5.

The substantive crime of trafficking in obscenity, Penal Code section 311.2, has two elements: (1) the knowing sale of; (2) obscene matter. As used in this section, "obscene matter" means matter which is "limited to patently offensive representations or descriptions of the specific 'hard-core' sexual conduct given as examples in Miller I, i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.'" Bloom v. Municipal Court for the Inglewood Judicial District of Los Angeles County, 16 Cal. 3d 71, , 127 Cal.Rptr. 317, 323 (February 6, 1976).

On the other hand,the substantive crime of "pandering"obscene matter, Penal Code section 311.5 has an entirely different burden of proof; namely, an intent to "promote" etc. for sale or distribution as pornographic, subject matter which may or may not prove to be pornographic. Kirby v. Municipal Court of the Newhall Judicial District et al., 237 Cal. App. 2d 335, 46 Cal. Rptr. 844 (September 30, 1965). Hearing denied by the California Supreme Court on November 24, 1965.

The distinction between Penal Code section 311.2 and 311.5, which the California Legislature intended when the latter section was enacted in 1961, is set forth in Kirby v. Municipal Court of the Newhall Judicial District, supra, at p. 854:

> "We hold that imposing criminal sanctions upon advertising or representing or holding out of any writing as obscene, the telling where to get it, is intrinsically needed and designed for protection of those who have depraved tastes and desires, as much so as is the display of same at the moment of sale, and that section 311.5 is constitutional when applied to one who acts without actual knowledge of the contents or complexion of the written matter that he promotes.

Section 311.5 was enacted in 1961 after American Law Institute has completed its 1957 draft of Model Penal Code. Our Supreme Court in Zeitlin v. Arnebergh, supra, 59 Cal.2d 901, 911, 31 Cal.Rptr. 800, 383 P.2d 152 stated that the Legislature patterned its definition of obscenity upon one set forth in said Model Penal Code and it is fair to assume that section 311.5 was modeled upon section 207.10 of that Code, the purpose of which is explained in comments found

on page 53 of Tentative Draft No. 6, viz.: 'Subsection (6) adopts a suggestion from the New York Penal law punishing advertising or other promotion of material "purporting to be" obscene. In other words, if the actor plays on prurient interest, holding out the promise of forbidden thrills, he may be convicted without proof that any particular material he meant to supply meets the tests of obscenity set forth in subsection (2). Such advertising may legitimately be forbidden as probably fraudulent, and also on the ground that a strong suggestion that a book or picture is obscene may well make it so in the mind of those who are persuaded to buy on this basis. It has been suggested that such huckstering is in fact worse than deliberate sale of genuine obscenity because: (1) the purchaser has frustration and a sense of being cheated in addition to his sense of guilt over desiring eroticism, and (2) it often constitutes a kind of defamation of serious works or learning or beauty."

B. The Evidence Of "Pandering" Which, By Itself, Would Support A Conviction Of Penal Code Section 311.5, Is Also Admissible Upon A Penal Code Section 311.2 Charge, Being Probative On Both Elements Of That Crime; i.e., (1) The Mens Rea Of "Knowingly", and (2) Whether Or Not The Subject Matter Has Redeeming Social Value.

Petitioner was convicted for selling obscene matter in violation of California Penal Code Section 311.2.

The evidence which was adduced at trial showed that Armand Drivon, a part-time employee of the Redwood City Police Department had known petitioner since 1966 when petitioner first offered "hardcore" pornography to Mr. Drivon (RT 44). In 1969, Mr. Drivon began negotiating with appellant's brother Don Splawn for the purchase of some "hardcore" films at petitioner's place of business, the Golden Gate Book Store located in Redwood City. Don Splawn advised Drivon that he had two "under-the-counter" films available for sale at a price of $50.00 apiece, but stated that these films were not carried in stock at petitioner's bookstore (RT 28). Several unsuccessful appointments were arranged

for Drivon to pick up the films (RT 29-34). During the course of negotiations, Don Splawn assured Drivon that he would be completely satisfied with the films. Describing the "hard-core" films he told Drivon that they would be sucking toes, licking navels and everything else (RT 30). He also mentioned that the films were being supplied by petitioner (RT 33). On November 4, 1969, Drivon met with petitioner at petitioner's bookstore to further discuss the purchase of these films (RT 35-36). Petitioner made a telephone call in an attempt to locate some films then left the store returning a few minutes later. Petitioner told Drivon that he could obtain the films in two days, but if Drivon was in a great hurry petitioner offered to go to San Francisco to pick them up (RT 37). They settled on the price of the films, which petitioner stated were normally selling for much more in San Francisco. Petitioner also explained to Drivon that he had to be very careful in handling these films since they were "hardcore" material concerning which he had previously had trouble with the police (RT 46). Petitioner assured Drivon that he would be getting strictly "hardcore" material (RT 47). When Drivon returned to petitioner's bookstore on November 7, 1969, the clerk gave

him a package containing two reels of film in exchange for $70.00 (RT 47). Drivon thereafter contacted petitioner by telephone, and from their conversation it was apparent that petitioner had previously viewed these films (RT 72). Petitioner admitted viewing the films prior to their sale (RT 633). The films themselves were admitted into evidence (RT 97) and are hard core pornography.

The trial court also permitted photographs, which showed the condition of the premises, to be introduced into evidence on the issue of the obscenity of the material (RT 77-83).

While it seems clear that the above direct and circumstantial evidence would support a conviction of "pandering" under Penal Code section 311.5, without any consideration as to whether the subject matter were obscene, the petitioner was not charged with that crime, nor should he be permitted, on this appeal, to create a straw man out of the issues which an appeal from a conviction under that section (Penal Code section 311.5) might raise. The respondent's burden of proof herein, under Penal Code section 311.2, was to establish that the subjects matter was hard-core pornography, and the central issue on this appeal should be limited to that of whether such "pandering type" evidence is probative

on the elements of the Penal Code section 311.2 crime, and whether the petitioner could reasonably be charged with notice of that evidentiary ruling.

In giving the challenged instruction on "pandering",[3/] the trial court merely recognized

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3/ (1) (I)n determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled is a matter for you, the Jury, to determine. (RT 882). (A 38).
(2) Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter (is) utterly without redeeming social importance. (RT 883). (A 39).
(3) If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence, that the work is obscene. (RT 883). (A 40).

the probative value of evidence of production and dissemination on one of the three definitional requirements for a finding of obscenity. The constitutionality of considering such evidence as probative on the question of social value was recognized by this Court in Ginzberg v. U.S., 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (March 21, 1966), and its application to California Law was almost immediately thereafter considered by the California Courts in Landau v. Fording, 245 Cal.App. 2d, 820, 824, 54 Cal.Rptr. 177, 179-180 (October 24, 1966) (more than three years before the date of the alleged offense). See also, People v. Stout, 18 Cal.App.3d 172, 95 Cal.Rptr. 593 (June 18, 1971); People v. Burnstad, 32 Cal.App.3d 560, 108 Cal.Rptr. 247, 251 (May 22, 1973) overruled on other grounds in People v. Superior Court, 14 Cal. 3d 82, 120 Cal.Rptr. 697, 701 (April 22, 1975); People v. Kuhns, 61 Cal.App.3d 735, 132 Cal.Rptr. 725, 714 (September 8, 1976) petition for writ of certiorari filed on January 13, 1977 in No. 76-970.

While the California Supreme Court in People v. Noroff, 67 Cal. 2d 761, 793, 63 Cal.Rptr. 575, 576 (November 21, 1967) noted a caveat as to the dictum in Landau v. Fording, supra, that Court, as was pointed out by the Court of Appeal below, "did not disapprove of any use of evidence

of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime" within Penal Code section 311.2.[4/]

C. The Ruling Of The Trial Court Below, That Evidence Of "Pandering" Is Probative On The Issue Of Social Value Within The Framework of Penal Code Section 311.2 As It Existed Prior To The 1969 Amendments, Does Not Present A Substantial Federal Question.

The opinion of the California Court of Appeal below clearly indicates that Penal Code section 311.2, as worded at the time of the offense in November of 1969, did allow "pandering" evidence on the issue of social value. That con-

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4/ It should be noted that when the California Supreme Court in Noroff stated:

> "We cannot accept the People's argument, advanced for the first time on appeal, that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's 'pandering' of the magazine in question. First, the indictment did not charge the defendants with pandering; second, the State Legislature has created no such crime."

it was addressing itself only to the scope of the Penal Code section 311.2 crime, as to which Noroff was charged. The Noroff opinion did not mention or consider Penal Code section 311.5, which clearly, under Kirby, supra, is a "pandering" crime. Amicus understands the Noroff court to have said that Penal Code section 311.2 does not encompass the "pandering" crime set forth in Penal Code section 311.5 (which does not require a finding that the subject matter is obscene).

struction of Penal Code section 311.2, as adopted by the California Courts is binding on this Court. General Trust Co. v. Blodgett, 287 U.S. 509, 513; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688.

In People v. Kuhns, supra, the California Court of Appeal noted at p. 734:

> "It well may be that defendants' arguments no longer rise to the level of constitutional dignity because the statute is merely a rule of evidence to be judged by ordinary standards of reasonableness. Be that as it may, we find no violation of constitutional principles as expostulated in Ginzburg and other cases reviewed above."

As noted above, any question of reasonableness which might have been raised regarding the probative nature of "pandering" evidence on the issue of social value was answered by this Court in Ginzburg v. U.S., supra.

D. Petitioner Has Not Been Subjected To An Ex Post Facto Application Of A Penal Statute.

The understanding of the meaning of the Ex Post Facto Clause has not changed significantly since Mr. Justice Chase announced for a unanimous Court in Calder v. Bull, 3 Dall. 385, 390, that a law is an ex post facto law if it makes criminal, acts which were not forbidden when they occurred; if it increases the punishment for criminal acts; or if it "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Also, a law is an ex post facto law if "in (its) relation to the offense, or its consequences (it) alters the situation of a party to his disadvantage" or "takes away or impairs the defense which the law has provided the defendant" at the time of the offense. Kring v. Missouri, 107 U.S. 221, 228-229 (quoting from United States v. Hall, 26 Fed. Cas. 84, 86-87 (No. 15,285).

Amicus submits that the judicial construction adopted by the California Courts below was forseeable, and a reasonable person would not have been caught unawares. At least since the date of Ginzburg, in 1966, evidence of production

and dissemination of the material in question has been constitutionally admissible in obscenity prosecutions, without the necessity of a specific statutory provision. The reasonableness of that ruling was recently reaffirmed in Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 628, 94 S.Ct. 2887 (June 24, 1976) where this Court noted:

> "Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be 'convicted' of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U.S.C. § 1461 (18 U.S.C.S. § 1461). The District Court's instruction was clearly consistent with our decision in Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied."

Although Bouie v. City of Columbia, 378 U.S. 347 (1964) does hold that a retroactive application of a court interpretation may offend the Due Process Clause, the Bouie holding is to be applied only to decisions which are "unexpected and in-

defensible by reference to the law which had been expressed prior to the conduct in issue...." Id. at 354.

The Petitioner, herein, has been on notice since Landau v. Fording, supra, in 1966 that such evidence of "pandering" would be admissible in California Courts on the determination of the obscenity of the materials at issue. See also, Bradley v. Richmond School Board, 416 U.S. 696, 40 L.Ed.2d 476, 94 S.Ct. 2006 (May 15, 1974) at 493, where this Court held:

> "From the outset, upon the filing of the original complaint in 1961, the Board engaged in a conscious course of conduct with the knowledge that, under different theories, discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees. Even assuming a degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under § 718, if known, rather than simply the commonlaw availability of an award, would have caused the Board to alter its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

DATED: February 20, 1977.

Respectfully submitted,

CHARLES H. KEATING, JR.
919 Provident Tower
Cincinnati, Ohio 45202

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California 91352

Counsel for Citizens for
Decency Through Law, Inc.

CERTIFICATE OF SERVICE

I, hereby certify that on this 20th day of February, 1977, copies of the within Motion of Citizens for Decency Through Law, Inc., For Leave To File a Brief as Amicus Curiae in Support of the Respondent People of the State of California; and Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent People of the State of California were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Mr. Evelle J. Younger
Attorney General of the State of California
555 Capitol Mall, Suite 550
Sacramento, California 95814

Mr. Arthur Wells, Jr.
125 12th Street
Suite 157
Oakland, California 94607

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California.

Counsel for Citizens for
Decency Through Law, Inc.